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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY
a division of
KNIGHT NEWSPAPERS, INC.,

Appellant,

v.

PAT L. TORNILLO, JR.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF OF THE NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, AMICUS CURIAE, IN SUPPORT OF AFFIRMANCE

ALBERT H. KRAMER
1346 Connecticut Ave., N.W.
Washington, D.C. 20036

THOMAS R. ASHER
Media Access Project
1910 N Street, N.W.
Washington, D.C. 20036

FRANK W. LLOYD, III.
Citizens Communications Center
1914 Sunderland Place, N.W.
Washington, D.C. 20036

Attorneys for Amicus Curiae, National Citizens Committee for Broadcasting

Of Counsel:

MATTHEW B. BOGIN
MARIA E. MALDONADO
Student Interns
Media Access Project

SHELLEY HIGGINS
Student Intern
Citizens Communications Center

April 1, 1974

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BRIEF OF THE NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, AMICUS CURIAE, IN SUPPORT OF AFFIRMANCE

The National Citizens Committee for Broadcasting submits this brief as *amicus curiae* in support of affirmance of the judgment of the Supreme Court of Florida, entered on July 18, 1973, *rehearing denied*, October 10, 1973, which judgment upheld the constitutionality of Section 104.38 of the Florida Statutes. Both parties to this action have given their written consent to

the filing of this brief pursuant to Supreme Court Rule 42(1). Copies of the letters of consent of the parties have been lodged with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

The National Citizens Committee for Broadcasting (NCCB) is a non-profit membership corporation devoted to assuring the public responsiveness of the broadcast media. NCCB has received financial support from about 16,000 Americans. It achieves its objectives by participating in the regulatory processes affecting media and engages in a wide array of educational and other activities to assist others to do so.

NCCB is not committed to any ideology; its commitment is to open media processes that assure that the public can hear a diversity of ideas in the media. NCCB has several concerns with regard to this case. The First Amendment principles involved in this case can potentially have a major impact on the public's right to obtain access to diverse views. The sweeping and absolute nature of the rights and principles urged upon this Court by the *Herald* and its *amici* supporters leave the public with virtually no recourse if the media fail to provide a spectrum of viewpoints or adequate information with regard to the electoral processes. Finally NCCB is concerned because of the implication, contained in the briefs of several *amici* who have filed in support of the *Herald*, that the Court should use this occasion to in some manner undermine, or at least do nothing to reaffirm, the fairness doctrine as applied to the broadcast media, which NCCB regards as a bedrock of the public's First Amendment right to hear diverse views.

STATEMENT

This case challenges the constitutionality of Section 104.38, Florida Revised Statutes (hereafter "the Reply Statute"). This issue was presented to the court below in the context of a real and substantial legal controversy, not in the context of some hypothetical or threatened application of the statute. Accordingly, we summarize the facts.

1. *The Statute*

As part of a comprehensive statutory scheme designed to assure fairness in the electoral process, the State of Florida in 1909 and 1913 enacted a number of statutes, including the predecessor of the Reply Statute.[1] The Reply Statute, as it is before this Court, provides as follows:[2]

> **104.38 Newspaper assailing candidate in an election; space for reply**
>
> If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to

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[1] Appendix (A.) 18-19.

[2] A. 47.

> comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083.

2. *The Editorials and Replies*

On September 20 and 29, 1972, the Appellant Miami *Herald* ran editorials vigorously attacking Appellee Tornillo's candidacy for the Democratic Party's nomination for a seat in the Florida legislature. The first editorial characterized Tornillo as the "Czar" of the Classroom Teachers Association (CTA) who led a teacher's strike which the editorial called "an illegal act against the public interest." It concluded:

> We cannot say it would be illegal but certainly it would be inexcusable of the voters if they sent Pat Tornillo to Tallahassee to occupy the seat for District 103 in the House of Representatives.[3]

The second editorial accused CTA of illegal activities in supporting Tornillo's candidacy, and characterized Tornillo as the CTA's "acerbic prexy" who "[f]or years now . . . has been kicking the public shin to call attention to his shakedown statesmanship."[4]

On September 27 and 30, 1972, Tornillo submitted to the *Herald* written replies to the respective editorials, requesting that they be printed in accordance with terms of the Reply Statute. Each reply statement was an effort to list the actions taken by both CTA and Tornillo to comply with the laws while seeking to safeguard the economic interests of teachers and the educational interests of the public. Tornillo's September 27 statement concludes:

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[3] A. 5.

[4] A. 8.

> Unfortunately, the Herald dwells on past history and ignores CTA's totally legal efforts of the past four years.
>
> We are proud of our record.[5]

Tornillo's September 30 statement concludes:

> We have attempted to obey all the laws of the state, not intentionally violating any, while continuing our efforts to alert the public to the impending financial crisis facing the schools.
>
> We have, however, also retained our belief in the right of public employees to engage in political activity and to support the candidates of our choice, as is the right of any citizen in this great country of ours.
>
> Aye, there's the rub.[6]

The *Herald* refused to print either reply, in whole or in part.

3. *The Litigation*

On October 1, 1972, Tornillo filed a civil complaint in the Dade County Circuit Court seeking money damages and a mandatory injunction that the *Herald* publish his replies, contending that he

> has neither the means nor the opportunity of responding to the attacks upon him by the Defendant save through the methods permitted by the Legislature in its adoption of F.S. 104.38.[7]

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[5] A. 6-7.

[6] A. 10.

[7] A. 3.

He further alleged that the *Herald's* attack on him had "been deliberately made in close proximity to this election date [the election was to be held on October 3, 1972, just four days after the *Herald's* second editorial] in order to make it impossible for [Tornillo] to reply in an adequate fashion,"[8] so as to materially reduce his chances to secure the nomination.

The trial court held the Reply Statute facially unconstitutional on the grounds that it (1) violates the First Amendment by imposing censorship on the press[9] and (2) is both overbroad and vague in its terms.[10]

On appeal, the Supreme Court of Florida reversed,[11] relying on opinions of this Court stressing the First Amendment's paramount interest in the free flow of information to the electorate. "[U]nderlying First Amendment guarantees there is a broad societal interest in the free flow of information to the public."[12] The court observed "that the First Amendment guarantee is 'not for the benefit of the press so much as for the benefit of us all,' "[13] and that "Freedom of the press . . . is not an end in itself but a means to the end of a free society."[14] The Reply Statute "is designed to add to the flow of information and ideas,"[15] by assuring that

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[8] *Ibid.*

[9] A. 12-13.

[10] A. 13-14.

[11] A. 15-17.

[12] A. 21.

[13] A. 19-20, quoting *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967).

[14] A. 20, quoting *Pennekamp v. Florida*, 328 U.S. 331 (1946).

[15] A. 22.

a "reader gets the whole story, rather than half of it."[16] A statute which assures that readers will not be "'blacked out' as to the other side of a controversy,"[17] the court stated, "does not deny to the owners of the instruments of the newspaper industry any right of expression."[18] The Reply Statute imposes no "prior restraint, since no *specified newspaper content is excluded.*"[19]

These considerations are particularly applicable to the Reply Statute, which is designed to achieve the bedrock First Amendment objective of a "fully informed electorate."[20] The statute "was enacted not to punish, coerce or censor the press but rather as a part of a centuries old legislative task of *maintaining conditions conducive to free and fair elections.*"[21] The court perceived a particular need for such regulation in light of "the growing concentration of the ownership of the mass media into

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[16] A. 33.

[17] *Ibid.*

[18] *Ibid.*

[19] A. 22 (emphasis in original). The court later cited *Rosenbloom v. Metromedia*, 403 U.S. 29, 47 (1971):

> If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern.

A. 26.

[20] A. 17.

[21] A. 19 (emphasis in original).

fewer and fewer hands, resulting ultimately in a form of private censorship."[22]

The Florida Supreme Court rejected the void for vagueness argument. The court recognized that a statute which was " 'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.' "[23] But it also stated its policy of giving "a statute, if reasonably possible, a construction supporting its constitutionality."[24] In accordance with this policy, the court narrowed the definition of "any reply" to mean a reply

> which is wholly responsive to the charge made in the editorial or other article in a newspaper being replied to and further that such reply will be neither libelous nor slanderous of the publication nor anyone else, nor vulgar or profane.[25]

As so construed, the court in a *per curiam* opinion found the statute sufficiently clear to withstand constitutional

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[22] A. 22. The court went on to cite this Court's opinion in *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

We would ask the Court to take judicial notice of the fact that metropolitan Miami has but two English language daily newspapers, the *Herald* and the *News*, except on Sundays when they publish a joint edition. In 1972, the *Herald*, a morning paper, had average daily circulation of 354,408, while the *News*, an evening paper, had average daily circulation of 78,119. Thus, the *Herald* had about 82% of the market. *Editor-Publisher Yearbook–1973.*

[23] A. 29, quoting *Brock v. Hardie*, 114 Fla. 670, 154 So. 690, 694 (1934).

[24] A. 30.

[25] *Ibid.*

challenge.[26] A concurring opinion, in which five other justices joined, was filed by Justice Roberts.[27] One Justice dissented.[28]

On rehearing,[29] the court again rejected the charge that the statute was unconstitutionally vague.[30]

This appeal followed.

ARGUMENT

I.

INTRODUCTION

This case presents a unique issue, one qualitatively different from any previously ruled upon by this Court. Contrary to the assertions of the *Herald* and a number of the *amici* supporting it, there is no established precedent that controls this case. At best, prior decisions may provide analogies or guidelines. But they provide no clear

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[26] A. 31.

[27] A. 33.

[28] A. 37.

[29] A. 39.

[30] It found the statute, as construed, similar to two Florida retraction statutes, one of which had earlier withstood constitutional challenge, and under which newspapers in the state had operated for a number of years without any apparent difficulty. A. 41-43. It recognized that it was under a duty to be especially cautious in construing the statute because of its penal nature. But the court found that the instant proceeding was civil in nature, and while the statute might fail to pass constitutional muster on void for vagueness grounds in a criminal prosecution, the penal provision was severable from the remainder of the statute without affecting its viability as a civil law. A. 39-41.

answers to the legal question before the Court. Accordingly, it is important to clarify at the outset what is and what is not involved in this case.

This Court has not previously confronted a constitutional challenge to a legislative effort to balance the following two competing First Amendment interests: (1) a newspaper's right to determine what it will not print and (2) the voting public's right to receive information from the widest possible range of sources, specifically, the electorate's right to be fully informed on electoral issues and the views of candidates.

Only three decisions of the Court have touched upon this delicate matter. *Red Lion Broadcasting Co. v. F.C.C.*,[31] *Columbia Broadcasting System, Inc. v. Democratic National Committee*,[32] and *Mills v. State of Alabama*.[33] While each case is instructive, none is controlling.

Both *Red Lion* and *CBS* involved government regulation of broadcasting, not the print media. *Red Lion* upheld the Federal Communications Commission's personal attack doctrine—which is similar to, but far broader than, the Reply Statute—in the face of a constitutional challenge by broadcasters. That challenge was virtually identical to the challenge here offered by and on behalf of the print media. In *CBS*, the Court rejected arguments that the First Amendment compels broadcasters to sell time to persons wishing to discuss controversial issues. Since broadcasting is subject to comprehensive govern-

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[31] 395 U.S. 367 (1969).

[32] 412 U.S. 94 (1973).

[33] 384 U.S. 214 (1966).

mental regulation, neither of these decisions is dispositive here.[34]

CBS is distinguishable from the instant case on another ground, as well. There, the complainants asserted a right to speak flowing directly from the First Amendment even though there was no statute or regulation conferring such a right. In rejecting the asserted right, the Court followed the *Red Lion* approach of deferring to legislative judgment (as the *Herald* herein contends the Court cannot) and relied upon the existence of the fairness doctrine, as it had been upheld in *Red Lion*, to adequately safeguard the public's First Amendment right to be adequately informed.

While *Mills* did involve a legislative attempt to regulate the print media's discussion of electoral matters, the Alabama statute there in issue sought to punish a newspaper's publication of an editorial position about electoral matters. It involved a legislative effort to prohibit publication, to restrict information available to the electorate. In contrast, the Reply Statute seeks the opposite objective, to expand the views reaching the voters, and leaves unfettered the newspaper's right to publish anything it wishes.

Ordinarily, the two First Amendment interests at issue in this case—an unfettered press discretion to choose the material it will and will not print and the achievement of an informed electorate—coincide. Indeed, it is the core

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[34] *Amicus* takes no position on the technical, physical and economic differences between broadcast and print media which might warrant different governmental regulatory approaches. The record is barren of facts or analysis of this question. The Court need not and, we urge, should not on this record reach that question. See, *infra* at 29-31, 38-39.

assumption of the First Amendment that unrestricted speech and an unfettered press will create a marketplace of ideas in which viewpoints are exchanged and are as open to acceptance or rejection as freely as are commodities in the commercial marketplace.[35] Thus, as this Court has often stressed, and as the court below recognized,[36] the First Amendment guarantee is "not for the benefit of the press so much as for the benefit of us all."[37]

However, the realities of communication in a modern, industrialized society vest in the mass media, especially those which, like the Miami *Herald*, enjoy monoply positions, the power to exclude valuable information from the public as well as the power to inform it.[38] When the danger of such exclusion is great, and the injury it can cause to the First Amendment interest in an informed electorate is serious, legislative efforts to strike a reasonable, non-censoring balance have been accorded great deference by the Court. That is the teaching of both *Red Lion* and *CBS*.

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[35] *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

[36] A. 19-20.

[37] *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967).

[38] In *Pennekamp v. Florida*, 328 U.S. 331, 365 (1946) (Frankfurter, J., concurring), this Court emphasized that the power of the press must be tempered with responsibility:

> ". . . the public function which belongs to the press makes it an obligation of honor to exercise this function only with the fullest sense of responsibility. Without such a lively sense of responsibility a free press may readily become a powerful instrument of injustice."

Red Lion sustained the constitutionality of the "fairness doctrine"[39] as applied to the broadcast media.[40] In doing so the Court deferred to the legislative reconciliation of the two First Amendment values, stressing that the public's right to know is paramount. Again in *CBS* the Court was faced with an asserted confrontation between these same two First Amendment values. The Court reaffirmed its commitment to the public's right to know. But it refused to inject constitutional imperatives, deferring again to the legislative judgment that the fairness doctrine adequately served both of the competing First Amendment interests.[41]

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[39] Communications Act of 1934, Section 315, as amended, 47 U.S.C. §315. See Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance. 29 Fed. Reg. 10416 (1964).

[40] We cite *Red Lion* at this point only for the proposition that there can exist a tension between these First Amendment values and that legislative efforts to safeguard the public's right to know will be afforded great deference. As stated above, *supra* at 9-10, *Amicus* believes there is no controlling precedent on the issues presented by the instant case. And as discussed below, *infra* at 28-30, *Amicus* is not attempting to assert that newspapers are or are not on the same regulatory footing as broadcasters, an issue *not* presented by this case. Further, and as is discussed more fully below, *infra* at 28-29, *Amicus* does not believe, as the *Herald* does believe (*Herald* Br. at 20-24), that the decision of the court below turned on the applicability to newspapers of the "scarcity" rationale of *Red Lion*.

[41] Essentially the Court found that the public right to know was satisfied by the "trustee" role conferred upon licensees by the Communications Act of 1934.

Red Lion and *CBS* are important not only because they illustrate the issue involved in this case; they illustrate what is *not* involved in this case. This case does not involve a legislative decision to advance a general police-power interest, such as the need for clean streets, in a way which might incidentally encroach on free speech rights.[42] Nor does it involve an effort to apply a general regulatory law, such as the antitrust laws,[43] or general legal obligation, such as the duty to appear before grand juries,[44] to the press. Thus, the Court is not required to balance public speech interests against governmental non-speech interests in order to determine whether the latter are sufficiently strong and compelling to outweigh the former. Here the task is far more difficult; for the legislature has had to weigh, and this Court must review and weigh the value of, one speech interest against another: the right of newspapers to exclude versus the right of the public to hear all essential points of view.

In this regard, the *Herald's* contention that Florida's interest in fair elections, or any other state interest, is not sufficiently compelling to warrant upholding the Reply Statute[45] is not responsive to the issues in this case.[46]

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[42] Compare *Schneider v. State*, 308 U.S. 147 (1939).

[43] *Associated Press v. United States*, 326 U.S. 1 (1945).

[44] See *Branzburg v. Hayes*, 408 U.S. 665 (1972).

[45] *Herald* Br. at 24-29.

[46] *Mills v. Alabama*, *supra*, contained an analysis of First Amendment rights in the context of elections. However, the only First Amendment right there in issue was the newspaper's interest in being free to publish. The countervailing state interest which Alabama's Supreme Court had held to justify the legislative publication prohibition was "the State's police power." 384 U.S. at

The state's police power over elections is not the only issue here; the primary issue is Florida's legislative judgment reconciling First Amendment interests.

As the Court below observed, the First Amendment interest in an informed electorate, the public's need to know and hear diverse views–the First Amendment interest emphasized by this Court in *Red Lion*–"is most critical during an election campaign."[47]

II.

THE CONSTITUTIONAL IMPERATIVE IN FAVOR OF THE WIDEST POSSIBLE DISSEMINATION OF VIEWS ON PUBLIC ISSUES IS PARTICULARLY COMPELLING IN THE ELECTORAL ARENA AND HAS BEEN SO RECOGNIZED BY BOTH COURTS AND LEGISLATURES.

It is well established that the core purpose of the First Amendment guarantee is "to secure 'the widest possible dissemination of information from diverse and antagonis-

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216. For this reason, and perhaps also because the Alabama statue was designed to restrict speech, the Court engaged in no balancing of First Amendment interests.

In contrast, the court below discussed the state's authority to generally regulate elections (A. 19) only after discussing the bedrock First Amendment interest in an informed electorate and pointing out that it was to achieve such an informed electorate that the Reply Statute was primarily directed. A. 17-18. See text following this note.

[47]A. 18. Indeed, it is somewhat anomalous to even speak of the state's police power over elections unless the precondition for meaningful elections–an informed electorate–has been met. And this precondition is the fundamental precept of popular government. See A. 17-18, quoting James Madison.

tic sources' "[48] and not to protect the private interests of newspapers. As Justice Frankfurter stated in *Associated Press v. United States, supra:*[49]

> I find myself entirely in agreement with [the lower court's opinion by] Judge Learned Hand that "neither exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."[50]

And as Chief Justice Burger pointed out in his dissenting opinion in *New York Times Co. v. United States,*[51] in arguments before this Court, the newspapers themselves successfully resisted the government's attempt to enjoin publication of the "Pentagon Papers" by asserting "the public 'right to know'."

To assure an adequate flow of information to the public, this Court has steadily broadened the permissible arena of public debate by imposing limitations on the application of libel laws to the press. The Court stated in

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[48] *New York Times Co. v. Sullivan, supra,* 376 U.S. at 266. (1964).

[49] 326 U.S. at 28, (concurring opinion), quoting 52 F.Supp. 362, 372 (1943).

[50] See also *Branzburg v. Hayes, supra,* 408 U.S. at 726-27. (dissenting opinion of Justice Stewart).

[51] 403 U.S. 713, 749 (1971).

New York Times Co. v. Sullivan that attempts to impose libel sanctions must be considered

> against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.[52]

The cases that followed *New York Times Co. v. Sullivan* have re-emphasized the public's interest in securing information about events of public or general interest,[53] or "public figures,"[54] or public officials.[55] It is no accident that most of these cases have confronted this Court with limitations on speech that impeded the flow of information about public officials. And it is similarly no accident that the Court has used its strongest language in protecting the flow of information in cases that have involved public officials or candidates for public office. The Court has recognized that the primary First Amendment goal is to assure an informed electorate:

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[52]376 U.S. at 270.

[53]*E.g., Rosenbloom v. Metromedia,* 403 U.S. 29 (1971). *Cf., Pickering v. Board of Education,* 391 U.S. 563 (1968); *Time, Inc. v. Hill,* 385 U.S. 374 (1967).

[54]*E.g., Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967); *Associated Press v. Walker,* 388 U.S. 130 (1967); *Linn v. Plant Guard Workers,* 383 U.S. 53 (1966).

[55]*E.g., Time, Inc. v. Pape,* 401 U.S. 279 (1971); *Greenbelt Publishing Assn. v. Bresler,* 398 U.S. 6 (1970); *St. Amant v. Thompson,* 390 U.S. 727 (1968); *Beckley Newspapers Corp. v. Hanks,* 389 U.S. 81 (1967); *Rosenblatt v. Baer,* 383 U.S. 75 (1966).

> [I]f . . . the First Amendment was "fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Roth v. United States*, 354 U.S. 476, 484, then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.[56]

The reason why the Court has focused on an informed electorate is plain. It has long been recognized that protecting the integrity of the electoral processes lies at the very heart of our democratic system of government and the liberties which the Constitution is designed to protect.[57] But for the process to function, citizens must not only be given free access to the ballot box, but must also be armed with sufficient information about the candidates and the issues to make intelligent, informed decisions.

The purpose of the Florida Reply Statute is to provide just such information, and it must be read in that light–in the light of the electorate's right to know. The implementation of this First Amendment interest has been recognized as conferring greater power upon the state than its ordinary police power.[58]

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[56] *Monitor Patroit Co. v. Roy*, 401 U.S. 265, 271-72 (1971).

[57] *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Yick Wo v. Hopkins*, 118 U.S. 356 (1885).

[58] Compare *Canon v. Justice Court of Lake Valley Judicial District of Eldorado County*, 39 Cal.Rptr. 228, 393 P.2d 429 (Sup. Ct. of Calif. 1964) and *United States v. Scott*, 195 F. Supp. 446 (D.N.D., 1961) (Statutes prohibiting distribution of anonymous campaign literature do not violate the First Amendment) with *Talley v. California*, 362 U.S. 60 (1960) (Ordinance prohibiting distribution of all anonymous handbills voided as impermissible exercise of state police power.)

Newspapers, of course, play a vital, indeed indispensible, role in securing the right of the electorate to be informed. One need not fault their performance, however, to recognize that even innocent acts of omission or commission by newspapers can drastically alter the electorate's ability to be well informed. The legislature thus has a substantial interest in assuring that newspapers do not hinder the flow of information to the electorate, and the First Amendment forms no absolute bar to the exercise of that power. In upholding the application of the antitrust laws to newspapers, this Court stated:

> It would be strange indeed . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. . . . Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.[59]

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[59] *Associated Press v. United States, supra,* 326 U.S. at 20 (footnote omitted). In the omitted footnote, the Court observed that the decree, as framed, did not order AP or its members to print or publish anything, but the Court did not say such a course would be prohibited if necessary to implement the decree.

The *Herald* cites *Associated Press* for the proposition that the "only" means for curing monopolization of the media is by application of the antitrust laws. *Herald* Br. at 27. *Associated Press* contains no such limitation; it merely sanctioned use of the antitrust laws as one means of curing monopolization of the media. See text following this note.

If the legislature can prevent private combinations that impose restraints on First Amendment rights, it can also act to prevent individuals from doing so, just as it may act to prevent individuals from imposing restraints on the exercise of other constitutional rights.[60]

Both Congress and the state legislatures have long recognized the need to protect the First Amendment interest in having an informed electorate. The Communications Act mandates that if one candidate appears on the broadcast media, the candidate's opponent(s) will be afforded an "equal opportunit[y]" to appear.[61] The regulations of the Federal Communications Commission ("FCC") require that candidates be informed of and have the opportunity to respond to political editorials endorsing another candidate.[62]

The Federal Elections Campaign Act of 1971[63] expresses an even stronger congressional concern for assuring that the electorate is adequately informed. It limits the rates that *both* newspapers and broadcast media may charge political candidates.[64] The Senate Report accompanying that legislation stated that the rate "limitations will . . . increase the amounts of air time and

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[60]*Cf.*, *eg.*, Civil Rights Act of 1964, Title VII, 42 U.S.C. §§2000e-1, *et seq.*

[61]Communications Act of 1934, Section 315, as amended, 47 U.S.C. §315(a), commonly known as the "equal opportunities provision."

[62]47 C.F.R. 73.123, 73.300, 73.598, 73.679. The constitutionality of these provisions was upheld in *Red Lion, supra.*

[63]86 Stat. 3, 47 U.S.C. §§801 *et seq.* and 2 U.S.C. §§431 *et seq.*

[64]47 U.S.C. §§315, 802, 803.

space which candidates may buy,"[65] resulting in a more informed electorate.[66]

State legislatures have also recognized the need to enact regulations to assure an informed electorate. For example, state statutes similar to the one at issue in *Canon, supra,* which prohibit the distribution of anonymous election material, are quite common.[67]

These statutes are legislative resolutions of the tension between the same First Amendment interests that are present in the instant case. Like the Florida Reply

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[65]Report of the Committee on Commerce on the Federal Elections Campaign Act of 1971, S. 382, Senate Report No. 92-96, 92d Cong., 1st Sess. 38 (1971).

[66]The provisions of the Federal Elections Campaign Act of 1971 are illustrative of the complex constitutional and public interest factors at work in legislative efforts to promote the First Amendment interest in assuring that the electorate is well informed while simultaneously safeguarding the integrity of the electoral process against economic exploitation and corruption. While Congress stressed the need to assure candidates "access to the media" (*id.* at 32) to express their views, and imposed rate limitations to further this objective, Congress restricted the amount of money candidates can spend for media time and space. Congress is still attempting to unravel the complex and closely interrelated First Amendment and other public policy interests touching on the electoral process. It is all the more reason for this Court to allow adequate breathing room for legislative manueverability instead of erecting broad constitutional barriers in the path of reform. See *infra* at 44-54.

[67]See *supra,* note 58. The Appendix to Appellee Tornillo's brief ~~below~~ contains a compilation of state statutes regulating the print media.

Statute, they are designed to increase rather than constrict the flow of information to the public.

The courts have not, of course, hesitated to strike down legislation which is designed to restrict the flow of information to the electorate. In *Mills v. Alabama, supra,* this Court struck down an Alabama statute prohibiting editorials on election day.[68] Similarly, in *American Civil Liberties Union, Inc. v. Jennings,*[69] a three judge district court invalidated the certification procedures of the Federal Elections Campaign Act of 1971[70] which prohibited newspapers from publishing political advertisements unless certain assurances were provided by the sponsoring party.[71]

In *Mills* and *Jennings* newspapers desired to print information relating to elections but were restrained by legislation which made the publisher vulnerable to criminal prosecution for printing the material. In the instant case, the Miami *Herald* has refused to print election

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[68]The Court explicitly found that the statute foreclosed debate:

> The state statute leaves people free to hurl their campaign charges up to the last minute of the day before election. The law held valid by the Alabama Supreme Court then goes on to make it a crime to answer those "last minute" charges on election day, the only time they can be effectively answered. Because the law prevents any adequate reply to these charges, it is wholly ineffective in protecting the electorate. . . .

384 U.S. at 220.

[69]366 F. Supp. 1041 (D.D.C. 1973).

[70]See *supra,* at 20-21.

[71]The newspaper was willing to publish the proferred ad except for the restraining effect of the Act. It joined the plaintiff in seeking to have the certification procedures declared unconstitutional.

information, and the newspaper industry is arguing that it has an unlimited power to restrict the flow of information to the public. The Florida statute, unlike the legislation invalidated in *Mills* and *Jennings*, is designed to insure that unwilling newspapers like the *Herald* print relevant information about candidates. In the instant case it is the newspaper, not the statute, which tends "to restrict the free and unfettered dissemination" of election opinion. Such obstruction, in the name of the First Amendment, "cannot be favorably viewed" by this Court.[72]

III.

THE HERALD AND ITS AMICI HAVE FAILED TO DEMONSTRATE THAT THE FLORIDA LEGISLATURE IS PROHIBITED BY THE FIRST AMENDMENT FROM BALANCING BETWEEN COMPETING FIRST AMENDMENT INTERESTS.

In an effort to convince the Court that the First Amendment works to absolutely and exclusively protect the print media's interest in retaining unfettered power to refuse to print any and all material, Appellant and its *amici* advance three basic arguments: (1) that their position is well established by case law; (2) that the effect of the Reply Statute or, for that matter, any other governmental publication requirement, will be to so severely "chill" newspapers' vigorous treatment of public issues as to be tantamount to direct censorship; and (3) that to permit the Reply Statute to stand would be to countenance the entry of the proverbial "camel's nose" of government censorship into the press "tent", leading inexorably to total government control of the press.

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[72] *Id.* at 1051.

Each of these arguments suffers from the very vagueness and overbreadth that the *Herald* attributes to the Reply Statute. They are without merit and illustrate how untenable is the extreme position urged upon the Court by the mass media. We shall deal with each argument in turn.

A. There Is No Direct Judicial Precedent Holding That the First Amendment Categorically Bars A Legislative Requirement That the Media Print Specified Material.

The *Herald* cites a number of cases as "uniform direct precedents"[73] that the First Amendment prohibits any legislation requiring a newspaper to publish specified election information. However, an examination of the cited cases indicates that no litigated case has invalidated state or federal election legislation on such sweeping grounds.

Chicago Joint Board, Amal. Cloth. Workers v. Chicago Tribune Co.,[74] *Associates & Aldrich Co. v. Times Mirror Co.*,[75] *Avins v. Rutgers*,[76] and *Resident Participation of Denver, Inc. v. Love*,[77] are erroneously cited by the *Herald* as "uniform direct precedents." However, not one of these cases invalidated legislation. Rather, like *CBS*,

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[73] *Herald* Br. at 18.

[74] 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971).

[75] 440 F.2d 133 (9th Cir. 1971).

[76] 385 F.2d 151 (3d Cir. 1967).

[77] 322 F.Supp. 1100 (D. Colo. 1971).

supra, they were unsuccessful attempts to secure *judicial* declaration of a constitutionally compelled right of access to newspapers. The question of state legislation requiring access in electoral or any other circumstances was not addressed.

Brown v. Murphy[78] and *Yablonski v. United Mine Workers of America*,[79] also cited by the *Herald* as direct precedents, are equally inapposite. Both involved individual claims for access on bases other than a statute providing for access.

In *Brown*, the plaintiff sought to judicially compel a magazine to publish a correction or retraction of material which portrayed him exchanging gunfire with police. The District Court denied this relief.[80]

The plaintiff in *Yablonski* sought an injunction directing (1) that a union journal print copy submitted by the plaintiff and (2) that future issues provide fair and equal treatment to the plaintiff's candidacy for the union's presidency. While the court did not require the journal to print the proffered copy, it reasoned that a provision of the Labor Management Reporting and Disclosure Act of 1959 effectively required the journal to give balanced coverage to the two candidates.[81] Thus, *Yablonski*

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[78] 355 F.Supp. 416, 417 (S.D.N.Y. 1973).

[79] 305 F.Supp. 868 (D.D.C. 1969).

[80] The petitioner was on trial in New York State Court. He based his claim to access on his right to a fair trial. The District Court deferred to the state court's procedures for insuring a fair trial. 355 F.Supp. at 418.

[81] The court enjoined the journal from using the union membership lists to distribute copy that discriminated in favor of the incumbent. 305 F.Supp. at 872.

actually relied upon a legislative judgment as to how to deal with an election problem involving sensitive First Amendment interests, imposing a "fairness" requirement which was far more extreme than Florida's Reply Statute.

Even the advisory opinion of the Supreme Judicial Court of Massachusetts, *Opinion of the Justices to the Senate*,[82] falls far short of adopting the *Herald's* position. The *Massachusetts* advisory opinion involved a State Senate request for judicial analysis of the constitutionality of a bill which would have required a publication that sells advertising space to one side of an electoral issue or contest to sell to all sides. The court advised that the proposed legislation would be unconstitutional for a combination of reasons, including the absence of legislative articulation of a compelling public interest;[83] and the danger that newspapers might bar all campaign advertising if carrying some opened the door to all.[84]

It is clear, then, that the *Massachusetts* advisory opinion stands for nothing like the absolute First Amendment straitjacket the *Herald* would impose on legislative efforts to compel access in certain limited electoral situations.[85] Moreover, the *Massachusetts* case illustrates the current state of legislative concern with assuring candi-

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[82] 298 N.E.2d 829 (Mass. 1973) (hereafter *"Massachusetts"*)

[83] *Id.* at 834.

[84] *Ibid.*

[85] Indeed, unlike the instant case, *Massachusetts* did not even involve a reply statute.

date access, a concern which, as indicated above,[86] is shared by the United States Congress.

Contrary to the *Herald's* argument, the only decision of this Court on the subject held that the First Amendment does *not* prohibit all legislative requirements that the print media publish specified material. In *Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (1913), two publishers challenged the validity of a federal statute requiring that all publications utilizing second class postal service publish, on a periodic basis, the names of the publication's ownership and editors, as well as certain other information, including circulation data.[87] The statute also required that all material published for consideration be labeled as an "advertisement".[88] The statute was challenged on the ground, *inter alia*, that it was an infringement on the publishers' First Amendment rights.[89] The Court stated that the publication requirement was a valid exercise of governmental power incident

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[86] Supra at 20-21.

[87] These basic requirements of the statute are presently contained in 39 U.S.C. §4369.

[88] This basic requirement is presently contained in 39 U.S.C. §4367.

[89] Like the *Herald* in the instant case, the publishers in *Lewis Publishing Co. v. Morgan* also argued that the publication requirement was a taking of property in contravention of procedural as well as substantive due process since they were not paid for the space required to publish the information. The Court rejected this challenge, observing that the government had created a "privileged" class of mail users, conferring upon them substantial economic benefit. It did not violate due process for the government to require publications availing themselves of this privilege to utilize their space to make the required disclosures. See 229 U.S. at 316.

to the constitutional power to regulate the use of the postal service. Having granted preferential postal rates to publications, Congress could validly act to assure public exposure to important information.[90]

Finally, to the extent the *Herald* and its *amici* rely on *Mills v. Alabama, supra,* and *ACLU v. Jennings, supra,* as "controlling precedent," they are wide of the mark. As indicated above[91] those cases hold only that the government's interest in fair elections does not countenance legislative restrictions upon or obstacles to speech on electoral issues. Indeed, it was to *afford* public access to the pages of newspapers that *ACLU v. Jennings* struck down Title I of the 1971 Federal Elections Campaign Act.[92]

B. The Herald and Its Amici Have Misconstrued the Meaning of Red Lion and CBS, As Well As the Florida Court's Citation of Red Lion.

The court below made clear that it relied on *Red Lion* only for the constitutional propositions (1) that there is a "First Amendment goal of producing an informed electorate,"[93] and (2) that the Reply Statute reflects a

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[90] Similar regulations governing access to the postal service have also been upheld. *E.g.,* 39 U.S.C. §4005, upheld in *Donaldson v. Read Magazine, Inc.,* 333 U.S. 178 (1948).

[91] *Supra* at 22-23. In addition, the other cases cited in the *Herald* brief (e.g. at 12 n. 22) are even more inapposite. All of them involved direct restraints on speech similar to those in *Mills* and *Jennings.*

[92] 366 F.Supp. at 1053. *Compare, New York Times, Co. v. Sullivan, supra,* 376 U.S. at 266.

[93] A. 24, quoting from *Red Lion*, 395 U.S. at 392.

legislative effort to resolve the tension between that First Amendment goal and the First Amendment goal of leaving newspapers free from any government compulsions.[94] The Florida Supreme Court specifically disclaimed any intention to draw upon *Red Lion* for more than principles "which are applicable to First Amendment guarantees in general."[95]

Apparently unwilling or unable to confront the ramifications of a conflict between First Amendment values, the *Herald* and several newspaper *amici* argue that the court below relied on *Red Lion* to import the Communications Act's "fairness doctrine" wholesale into the print media market. They then attack this straw man by demonstrating that *Red Lion* does not, in its terms, address the print media and by arguing that *Red Lion* holds that different technological barriers to entry into broadcasting and the newspaper business justify differing First Amendment treatment of the two media.[96]

While the print media thus seek to escape *Red Lion's* constitutional principles by [redacted] misreading the holding of the court below, their broadcaster bretheren, in the apparent hope of avoiding any suggestion by the Court that *Red Lion* and the fairness doctrine are still constitutionally alive, ask the Court to decide the instant case without reference to *Red Lion*.[97]

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[94] A. 22-25.

[95] A. 25 Even when it added a dictum to the effect that newspapers make use of electronic media to transmit news, the court below again spoke in terms of the *Red Lion* "principles." A. 32.

[96] *Herald* Br. at 20-22; American Newspaper Publishers Assn. (ANPA) Br. at 5-6; Washington *Post* Br. at 43-48; Reporters' Committee Br. at 7-9.

[97] Radio and Television News Directors Assn. (RTNDA) Br. at 3-5, 15, 20; National Association of Broadcasters (NAB) Br. at 2, 7-8, 10-11, 14-15.

As we have indicated above, neither of these positions is responsive to the Florida Supreme Court's opinion nor to the legal issues pending before the Court. While we agree with the broadcasters that the Court, on this record, has no basis to reconsider either the result reached in *Red Lion* or the constitutional implications of broadcasting's fairness doctrine, surely *Red Lion's* definition of the competing First Amendment interests and their appropriateness for legislative resolution cannot be avoided.

The fairness doctrine is not before the Court, nor does the record contain any evidence which would enable the Court to make a reasoned decision involving it.

Nevertheless, despite its statement that these issues should be kept out of the instant proceeding, RTNDA attempts to begin litigating the "chilling effect" of the fairness doctrine in its *amicus* brief.[98] Yet if anything is clear from the Court's decision last term in *CBS*, it is that the result there was premised in large measure on the continued existence and vitality of the broadcaster's "public trustee" duty under the fairness doctrine to meet the "public interest in being fully and fairly informed."[99]

The Court there further noted the great deference which must be paid to decisions of Congress and the F.C.C. in such delicate regulatory matters.[100] It specifically recognized the Commission's ongoing fairness re-regulation study as a critical part of this "necessarily dynamic process."[101] Having taken this approach, it

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[98]RTNDA Br. at 16-20.

[99]412 U.S. at 111-112.

[100]*Id.* at 103.

[101]*Id.* at 132.

would be particularly anomalous for the Court now to reach out for a re-examination of the fairness doctrine before the Commission's report on its inquiry is even publicly released.[102]

C. Clearly Defined Legislative Requirements that Candidate Information be Published Need Not Impose A "Chill" On Vigorous Newspaper Coverage Of Electoral Issues.

The *Herald*, and many of its media *amici*, argue that the state's determination in this instance to further the public's First Amendment right to hear competing voices on electoral issues will create a "chilling effect" on the freedom of newspapers to cover elections vigorously.[103]

The alleged chill created by the Reply Statute would flow from (1) the fact that if a newspaper covers electoral matters, it will have to make reply space available to attacked candidates, (2) the fact that reply space must be provided for free, thereby allegedly imposing significant

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[102] To follow the logic of *CBS* and *Red Lion*, 395 U.S. at 381-382, the broadcasters appearing as *amici* here should be making their arguments for "reform" to the Commission. It is the Commission which in the first instance must balance the competing First Amendment interests inherent in the fairness doctrine, just as the state legislature and the courts had to resolve those interests in adopting and upholding the newspaper right of reply statute at issue here. Broadcasting standards such as the fairness doctrine are indeed "evolving" ones. *CBS*, 412 U.S. at 110. Therefore their evolution should be left to the primary supervision of the Commission that is charged with responsibility for executing the statutory scheme, as this Court recognized in *CBS*.

[103] See, e.g., *Herald* Br. at 29-30; Washington *Post* at 49-51; Reporter's Committee Br. at 16-19; RTNDA Br., *passim*.

costs on newspaper publishers, and (3) the alleged vagueness and overbreadth of the Reply Statute, which leaves newspapers unsure which coverage of a candidate might trigger the Reply Statute's requirements.

Amicus suggests that this three-pronged chill argument is too speculative to form the basis of a constitutional determination that the Reply Statute infringes too heavily on the newspapers' First Amendment rights. Furthermore, even assuming *arguendo* that the Reply Statute creates a dangerous chill, this constitutes no justification for the media's assertion that, to avoid such "chilling effects," the Court must prohibit all legislative efforts to require the publication of information needed to assure an informed electorate. As we discuss below, it is possible to enact legislation which both protects the electorate's right to be informed and is "chillproof."

1. The Asserted Chilling Effect Is Too Speculative To Support Arguments Of Legislative Unconstitutionality.

We agree, as the Court recently said of similar "chilling effect" arguments advanced by the media in support of their request for a newsman's privilege, that such arguments are "not irrational."[103a] Nevertheless, the "chilling effect" argument here rests on no more firm, specific foundation than the Court found present in *Branzburg*. It thus cannot invalidate a state's statutory determination as to its overriding interests in widening its citizens' First Amendment right to hear divergent views, particularly in the electoral arena.

[103a] *Branzburg v. Hayes, supra,* 408 U.S. at 693.

The "evidence" adduced by newsmen here,[104] far more than the evidence in *Branzburg*, is "unclear" and "speculative".[105] Estimates of the inhibiting effects of the statute in question are similarly "widely divergent"; and those of newsmen are equally based on "professional self-interest."[106] As in *Branzburg*, the print media and broadcaster chill argument "fails to demonstrate that there would be a significant constriction of the flow of news to the public."[107]

As discussed below, the speculative arguments of chill and censorship advanced by the media in the instant case are consistent with a tradition of such efforts. The mass media, broadcast and print, have, in their search for a constitutional shield against any and all public accountability, long been making arguments to this Court of an impending censorship apocalypse, arguments which rarely prove to contain sufficient substance to require the drastic remedy proposed.

2. *The Media's Traditional "Cry Wolf" Arguments Should Be Rejected Here.*

In *Red Lion* the broadcasters made virtually the same contentions as they and the print media advance in the

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[104] See Reporters Committee Brief *Passim*.

[105] 408 U.S. at 694-95.

[106] *Ibid.* The individual *Amici* in the Reporters Committee Brief assert that the Reply Statute may chill their ability to have their writings published in Florida newspapers. We agree that the Court should be sensitive to their need, but we believe the Court should be equally sensitive to the need to ensure that the public hears the views of candidates for public office, like Tornillo.

[107] *Id.* at 694.

instant case – i.e., that editorializing rules would "chill" off the air the discussion of important public issues. Subsequent developments indicate the lack of merit in those projections. *Red Lion* involved a federal rather than a state-created reply remedy. The Court there was bombarded with fervent warnings from the broadcast media that judicial sanction of that remedy, a right of reply, would have precisely the same censoring effects as are argued by the *Herald* and its *amici* in this case, five years later.

In fact, one of the *amici* in this case argued strongly against adoption of the Court's *Red Lion* decision on the very same grounds that it advances here. RTNDA consistently urged from the outset that the FCC's personal attack right of reply rules fostered "self-censorship" that would cause broadcasters to steer "wide of the dangerous zone."[108] RTNDA argued that the "chilling effect" of any rule giving a right of reply to broadcast personal attacks would severely emasculate such programs as Eric Sevareid's commentaries, *Face the Nation*, and network news documentaries.[109] The choices, it claimed, would be solely between elimination of an attack or of an entire program (rejecting out of hand as unworkable the third possibility – complying with the rule by permitting a reply).[110]

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[108] See RTNDA, CBS, NBC Joint Petition for Writ of Certiorari Before Judgment in *RTNDA v. United States* (which was ultimately decided favorably to RTNDA by the 7th Circuit, 400 F.2d 1002 (1968), and consolidated with *Red Lion* in this Court), at 9.

[109] *Id.* at 11-12.

[110] *Id.* at 12. RTNDA restated these arguments in detail in its ultimate brief on the merits of *Red Lion* in this Court. *Red Lion* RTNDA Br. at 31-36. CBS, in the consolidated cases, wrote a

This Court in *Red Lion* properly rejected this line of argument, holding that the "possibility" of media self-censorship was "at best speculative."[111] The Court found, perhaps on the basis of the representations to this effect in at least one network's brief,[112] that the general fairness doctrine obligations imposed on broadcasters had not in the past inhibited robust journalism. To show that the rules would actually reduce rather than expand the diversity of controversial views aired, actual "experience" was necessary.[113] In the final analysis, the Court, as previously noted, held that the First Amendment rights of the public are paramount, and that the governmental choice of a mandatory right of reply was not "inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs."[114]

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separate brief from RTNDA for the stated purpose of trying to demonstrate, by specific examples from its own programs, that the rules would have a deterrent, chilling effect on its broadcast of views on controversial issues. *Red Lion* CBS Br. at 1-2. It submitted a separate Volume II of the Record containing examples from Eric Sevareid's commentaries, *Face the Nation, CBS Reports* and other news documentaries as examples of material upon which the Commission's right of reply rules for personal attacks would have "an insidious, if not totally destructive effect." *Id.* at 4. CBS even argued that under such a rule "news documentary programs as we now know them could not continue. . ." *Id.* at 41.

[111] 395 U.S. at 393.

[112] *Red Lion* CBS Br. at 6-7, 59-62.

[113] 395 U.S. at 393.

[114] 395 U.S. at 392. See also *Mt. Mansfield Television, Inc. v. F.C.C.* 442 F.2d 470 (2nd Cir. 1971) (no assumption would be made of a "speculative" decrease in network controversial programming as a result of adoption of a rule limiting the number of network programs network affiliated television stations may broadcast during prime television viewing hours).

The broadcasters in *Red Lion* also argued, as do the media here, in the instant case, that the practical and financial burdens caused by offering free reply time and the vagueness of the rules at issue there would "chill" their coverage of controversial matters.[115] The Court answered the "vagueness" contention in *Red Lion* by taking the same approach we advocate in this case. It observed that "there was nothing vague about the FCC's specific ruling in *Red Lion*" and stated that it "will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable . . . . but will deal with those problems if and when they arise."[116]

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[115] Ironically the broadcasters' argument there was specifically based on the comparative ease with which a newspaper could comply with a similar right of reply rule. One brief noted that "unlike a newspaper, which has few practical limitations on the number of pages and columns that it can publish, a broadcast station is sharply limited by the finite nature of broadcast time." *Red Lion* CBS Brief at 14. Other "characteristics not shared by the printed press" were adduced to show how much more severely a right of reply requirement would burden broadcasters. These included "the fact that any additional material broadcast necessarily replaces other material, the unpredictable content of unrehearsed interviews or discussions and the practical problems of network program scheduling and station clearance. *Id.* at 4.

[116] 395 U.S. at 395-96 (footnote omitted). The facts and circumstances of the instant case hardly give cause for alarm about the possibility of irational judicial construction. Here there were unquestionably attacks upon the personal character of the candidate Tornillo in two *Herald* editorials. (App. 5, 8) Tornillo submitted statements directly responsive to the editorials, the same length as the editorial (App. 6, 9.) No clearer case could be presented within the statute. Thus, as applied here, under its most narrow construction, the statute gave reasonable notice to the *Herald*.

Looking back over the five years since the *Red Lion* decision, it is difficult to find hard evidence bearing out the broadcasters' predictions of chill on financial burden or any other grounds as well. Eric Sevareid still delivers commentaries with a bite, public figures are still effectively grilled on *Face the Nation*, and network news documentaries still cover controversial issues. In fact, during that period the public saw some of broadcast journalism's most hard hitting coverage, including the *Pentagon Papers*, Vietnam, and, according to some, the widespread emergence of "advocacy journalism."[117]

At the same time, during the past five years, both the general fairness doctrine and the FCC's narrower personal attack and political editorializing right of reply rules have enabled the listening public to hear rebuttal on many issues that might otherwise have been monopolized by views on only one side.[118]

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[117] Certainly the broadcaster *amici* in this case, who now reverse the position of at least some of their brethern in *Red Lion* and attack even the overall fairness doctrine as "chilling," present in their briefs here no specific examples of inhibited broadcast speech.

In fact, the most "chilling" restrictions on mass media sources such as television and newspapers come from the fact that many view their primary functions as vehicles for advertising rather than journalism, and thus are more subject to private economic, rather than governmental, pressures. As to this effect on television journalism, for example, see Friendly, *Due To Circumstances Beyond Our Control* (1967) (esp. Ch. 10. "Common Stock v. the Commonweal"); Brown, *Television, The Business Behind the Box* (1971), Barrett, *Survey of Broadcast Journalism 1970-71*, 83-89 (1971).

[118] In 1972, for example, after a fairness complaint against a Denver television station that had broadcast 60 editorialized station identifications taking a position against a state-wide ballot proposition that would bar the 1976 Olympics from Denver,

Yet even in their briefs in this case, the broadcasters persist in arguing that the fairness doctrine is unworkable. Both NAB and RTNDA argue that the fairness doctrine "has come under increasing question,"[119] and that its critics have included "leading jurists and present and former FCC officials."[120] They then cite several critics of the doctrine, omitting to note its many supporters,[121] a

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supporters of the proposition received two five-minute prime time slots. The proposition was adopted. Like this case, which is taken from an exchange of correspondence in the files of the Citizens Communications Center, most of the cases in which time is actually received are not litigated, and are therefore unreported.

[119] NAB Br. at 2.

[120] RTNDA Br. at 5.

[121] Even of the list adduced of those opposing the fairness doctrine, many, such as former Chairman Burch and former General Counsel Geller, have never disavowed the doctrine; they have questioned its procedural application by the FCC or the wisdom of utilizing the rationales of the past for retaining it in precisely the same administrative form. Two of the RTNDA-cited critics of the doctrine, former FCC Chairman Paul Porter and E. William Henry, are now private attorneys with broadcast clients. Two other RTNDA-cited sources, Sam Ervin and the Cambridge, Massachusetts Conference on "The First Amendment and the News Media," according to the sources cited in their brief, directed their remarks primarily to the doctrine's application to radio rather than television. And the RTNDA-cited article concerning the supposed conversion of Judge J. Skelly Wright (*Broadcasting*, July 11, 1973, p. 28) quotes him as ultimately reaching a conclusion that is the opposite of what RTNDA states:

> "... before we de-regulate the public media in the name of the First Amendment and allow the licensees or the advertisers that support them to manipulate public opinion as they desire, we should proceed with the greatest caution."

number of whom have filed extensive comments in the Commission's pending rule making proceeding on possible changes in the Commission's administration of the fairness doctrine.

Our exploration of the arguments made here by broadcasters and rejected by this Court in *Red Lion* is not meant to indicate that *Amicus* believes that the validity of the broadcast fairness doctrine upheld there is in any way before the Court in this case.[122] Rather, it is intended to show the Court's wisdom in rejecting purely speculative allegations of a potential chilling effect on the exercise of journalistic speech in mass media. As outlined above, this Court has consigned minimal weight to such arguments when, as in both *Red Lion* and the instant case, important competing First Amendment interests, such as the public's interest in hearing diverse viewpoints on controversial issues, are involved.

3. Even If The Reply Statute Creates An Impermissible Restraint On Newspapers' Free Press Rights, A Flat Constitutional Ban On Any Legislative Publication Requirement Is Wholly Unwarranted

Even if the Court were to find a serious potential "chilling effect" on robust presentation of controversial issues by Florida newspapers because of the Reply Statute here at issue, it does not follow that *any* law compelling a newspaper to print *any* matter it does not want to print must perforce violate the First Amendment.[123] A legislature could enact a tightly drawn statute

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[122] See PP. 28-31, *supra.*

[123] See generally, *Lewis, supra,* 229 U.S. at 302-305. See also *The Newspaper Preservation Act,* 15 U.S.C. §1801 (1970) where

that creates no chilling potential. For example, if publishers would refrain from affording vigorous coverage of electoral matters in order to avoid a compulsory reply requirement, surely legislation that granted candidates access regardless of what a paper printed would cause no such chill. Similarly, a statute requiring newspapers to sell space at their prevailing rates to all candidates for public office would be chill-proof. The paper would be given no incentive to self-censor since it would be required to sell space to candidates regardless of what it prints in its news and editorial columns. Likewise, if chill is thought to derive from the Reply Statute's requirement of *free* publication of candidate responses, a statute which provided for paid replies, or compulsory newspaper acceptance of advertising, would not create any such chill. And if vagueness creates a chill, a narrow statute that defined in clear and precise terms when and to what classes of publications it applied would overcome that objection.[124]

Congress, in effect overruling this Court's decision in *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), authorized certain newspapers to enter into joint operating agreements which otherwise might have violated the antitrust laws. The rationale behind the Act was that this economic aid was necessary to preserve the number and diversity of editorial voices. Under the reasoning advanced by the *Herald* which, ironically, is a beneficiary of that legislation, the Act's requirement of independent editorial voices – the very justification for the economic benefits conferred by the Act – could be voided.

[124] Moreover, where a serious "chilling" burden has in the past been shown from a statute designed to increase speech in an electoral context, the Court has been able to fashion remedies that remove the danger without invalidating the statute itself. See, *e.g. Farmer's Educ. & Coop. Union v. WDAY*, 360 U.S. 525 (1959) (licensee relieved from liability for defamation in broadcast by candidate under equal time provisions of Section 315 of the Communications Act).

D. The Media's Argument That Any Compelled Access Will Open The Floodgates Of Government Regulation Of Newspapers Has No More Validity Than Their "Chill" Arguments

The *Herald*, in addition to arguing "chill", raises the spectre of "total governmental control of the content of all newspapers"[125] if the Reply Statute is sustained. This familiar argument has been raised by both the newspaper and broadcast media every time the government attempts to adopt "reasonable rules and regulations which fall short of abridgment of the freedom of speech and press."[126] The courts have usually recognized this argument as premature, and even more speculative than the "chilling effect" arguments. They have assumed that if arbitrary and impermissible governmental intrusions ever do occur, the courts will be able to deal effectively with them.

Red Lion, for example, rejected the "total control" spectre. The Court there stated that by approving the personal attack rules it did not mean to "ratify every past and future decision by the FCC with regard to programming," and it indicated the types of restrictions on broadcaster speech which would be repugnant to the First Amendment and would be struck down.[127]

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[125] *Herald* Br. at 32.

[126] *Red Lion, supra*, 395 U.S. at 382. See, *Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (1913).

[127] 395 U.S. at 396. This Court, and the lower federal courts have consistently rejected this argument, as it has been raised by broadcasters, whenever the government takes steps to increase the diversity of speech in that medium. *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) (elimination of network's "option time"); *Banzhaf v. F.C.C.*, 405 F.2d 1082 (D.C. Cir. 1969) (requiring cigarette advertising counter-messages); *National Associ-*

Similarly, in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), this Court again rejected the "camel's nose in the tent" argument in connection with newspapers. It there upheld a local ordinance barring reference to sex in help-wanted advertising columns, finding that it was not an unconstitutional abridgment of a newspaper's absolute discretion. Rebutting the charge that it was sanctioning wholesale government dictation of the form and substance of newspapers, the Court emphasized that its decision did not "authorize any restriction whatsoever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors."[128]

The media's continuous and excessive use of the argument that the next incidental restriction will wipe out the First Amendment and the free press in fact creates its own dangers. As the former head of CBS News has stated in arguing for retention of the fairness doctrine and criticizing the *Herald* in this case for its intransigent refusal to publish Tornillo's reply:

> I don't know which alarms me more—prosecutors and jurists flooding the courts ~~with~~ and subpoenaed reporters and contempt citations or newsmen and

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ation of Theatre Owners v. F.C.C., 420 F.2d 194 (D.C. Cir. 1969) (program type restrictions on subscription television); *Mt. Mansfield Television, Inc. v. F.C.C.*, 442 F.2d 470 (2d Cir. 1971) ("prime time access" rule, see *supra*, note 114).

[128] 413 U.S. at 391. In the instant case as well as in *Branzburg*, the state statute at issue directly, by its terms, "involves no restraint on what newspapers may publish", in the first instance, 408 U.S. at 681. It provides solely that a political candidate has a limited right of reply in the newspaper's own columns to, in effect, a personal attack.

publishers crying 'First Amendment' every time they are challenged.[129]

By "crying wolf" every time any limited attempt is made to diversify the sources of speech, the media themselves denigrate the value of the First Amendment.[130]

In sum, this Court should adhere to the principle that where competing First Amendment interests clash, simplistic arguments about the possibility of extreme governmental interference with the media are off-base. Rather, "[t]he balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions."[131]

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[129] "Media Are Scored By Fred Friendly"/"He Finds Excessive Use of First Amendment Slogan," *New York Times*, January 12, 1974.

[130] One of the chief ironies of the automatic First Amendment cloak of journalistic freedom that the media wrap about themselves each time there is an attempt to diversify speech is that as soon as the challenge to their absolute discretion to exclude viewpoints is passed, they return to business as usual, avoiding exercise of the journalistic freedom they have so recently defended by tailoring programming so as not to offend their advertisers. Senator Frank Moss, in a recent speech to broadcasters, noted the latter phenomenon in several deleted segments of network programs concerning medical insurance and malpractice that offended the AMA, and stated:

> "When you justly express fear of government encroachment on the freedom of the broadcaster to resist government-sponsored propaganda in any form of programming, I'm with you, and the American public is with you. But when you allow yourselves, with a rather exaggerated sense of deference to your advertisers for the simple human wish to avoid controversy, to shield the American public from a hard look at the realities of our problems and institutions, then you have become the censors and you are violating our First Amendment rights – the right of access."

_ *Broadcasting*, February 25, 1974, p. 29.

[131] *Branzburg v. Hayes*, *supra*, 408 U.S. at 710 (Justice Powell, concurring).

IV.

THE WELL ESTABLISHED PRINCIPLES OF JUDICIAL DEFERENCE TO LEGISLATIVE JUDGMENTS AND FEDERALISM REQUIRE THAT THE COURT PERMIT LEGISLATURES MAXIMUM MANEUVERABILITY FOR RESOLUTION OF THE COMPETING FIRST AMENDMENT POLICIES AT ISSUE IN THIS CASE. THAT COURSE WOULD PERMIT THE WIDEST POSSIBLE BREATHING SPACE FOR FIRST AMENDMENT VALUES.

The sweeping principles urged upon this Court by the media would wrap legislative attempts to assure an informed electorate—the core purpose of the First Amendment—in a "constitutional strait-jacket."[132] This Court has wisely eschewed such a course in areas where judicial deference to legislative judgments reconciling competing interests and judicial deference to "[o]ur Federalism"[133] is warranted.

A. The Legislature May Validly Determine That There is a Legitimate First Amendment Interest In Publication of Certain Information.

In *Lewis Publishing Co. v. Morgan*[134] this Court turned aside a First Amendment attack on a statute requiring disclosure of certain information in order to qualify for second class mail privileges. In *Lewis* the Court was engaged in what today would be referred to as "balancing": Is the government's police power interest adequate to overcome the statute's incidential infringement on First Amendment rights? But in the instant case, the Court need not balance a police power interest

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[132] *CBS v. DNC, supra,* 412 U.S. at 101.

[133] *Younger v. Harris,* 401 U.S. 37, 44 (1971).

[134] 229 U.S. 288 (1913), discussed *supra* at 27-28.

against an incidental or direct infringement of First Amendment rights. Rather, the problem is how to reconcile competing First Amendment interests. The Florida legislature chose the Reply Statute to reconcile these interests in favor of the right of the electorate to be informed. Appellant cannot simply state that it is "censorship" to require it to print anything it does not want to print and thereby nullify a considered legislative judgment which seeks to reconcile competing First Amendment interests. If Congress' interest in maintaining the integrity of the postal services was held by this Court to be sufficiently strong to offset the publishers' interest in refusing to print certain information, it follows *a fortiori* that the Reply Statute which requires the publication of certain materials in order to vindicate the First Amendment interest in an informed electorate is not, as Appellant would have it, invalid.[135]

Many state and local statutes also require that (a) certain materials appearing in newspapers and other publications be clearly identified generally as advertisements, (b) paid political advertisements be specifically so denominated, and/or (c) information regarding sponsorship of paid political advertisements also be provided. A catalogue of such statutes already is a part of the record

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[135] Indeed, *Lewis* itself could be viewed as in part based on the public's First Amendment right to know. As the Court stated in *Lewis*, the interest of Congress in enacting the disclosure requirement was "to secure to the public in 'the dissemination of knowledge of current events' by means of newspaper, the names not only of the apparent, but of what might prove to be the real and substantial owners of the publications, and to enable the public to know whether matter which was published was what it purported to be or was in substance a paid advertisement." 229 U.S. at 315-16.

before this Court,[136] and need not be repeated here. The *Herald's* contention that any form of compulsory publication of informational matter is censorship[137] would likewise invalidate these statutes. Yet each reflects a legislative judgment of how the clash of conflicting First Amendment values should be resolved.

Many states and localities also impose newspaper publication requirements in connection with a wide array of legal transactions, such as probate, property condemnation, licensing for alcoholic beverages, the sales of certain property, and escheat. These requirements recognize the critical role of newspapers as disseminators of information and as journals of public record.[138] These statutes are normally framed in terms of requiring the parties to the transaction to publish. But it would seem anomalous if a state could impose such a requirement on the parties to the transaction but could not compel newspapers of general circulation to carry such notices.[139] Certainly a discriminatory refusal to publish such notices, such as a newspaper's refusal on racial grounds to carry death notices–a legal prerequisite to probate in many states–could be legislatively barred.[140]

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[136] See Appendix to Brief of Appellee Tornillo.

[137] *Herald* Brief at 10-20.

[138] Indeed, in proceedings before the Federal Communications Commission, the National Newspaper Association opposed a proposed rule that replaced with an on the air announcement the requirement that a broadcast licensee publish notice that its license renewal application was pending. The NNA argued that broadcast announcements were insufficient to inform the public of pending license applications. *Renewal of Broadcast Licenses,* 44 F.C.C.2d 405, 418-20.

[139] But see *Mack v. Costello,* 32 S.D. 511, 143 N.W. 950 (1913), where a newspaper defendant's refusal to carry plaintiff's ad, a notice required by law, was sustained. However, there was no statute requiring the newspaper to carry the notice.

[140] *Cf. Pittsburgh Press Co. v. Pittsburgh Committee on Human Relations,* 413 U.S. 376 (1973).

B. Legislatures Should Be Accorded Maneuverability In Making Judgments Designed to Further First Amendment Values, And Their Decisions Should Be Accorded Broad Deference.

The statute under attack here is part of a comprehensive scheme regulating elections. As early as 1885, the Florida constitution commanded that state's legislature "to pass laws 'regulating elections and prohibiting under adequate penalties all undue influence thereof from power, bribery, tumult or other improper practices' and to 'enact such laws as will preserve the purity of the ballot given under this Constitution.' "[141] By 1909, Florida had enacted a comprehensive corrupt practices act to deal with primary elections. The statute in question was enacted four years later, "not to punish, coerce or censor the press but rather as a part of a centuries old legislative task of *maintaining conditions conducive to free and fair elections.*"[142]

That the government has a special interest in maintaining fair elections is beyond question. As discussed above, this special interest has been manifest at both the state and national level.[143] The electoral process, which is the bedrock of democracy, presumes that the First Amendment goal of an informed electorate has been achieved. But in the instant case, this Court is faced with a legislative judgment that, in a particular electoral situation, there is a confrontation between First Amendment

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[141] A. 18.

[142] A. 19. Emphasis in original.

[143] *Supra*, at 20-22.

principles that normally should operate in harmony. Where these interests clash, the task of reconciling them is necessarily a sensitive one, touching core values of a free and democratic society. It is, in every sense, a "legislative task."[144] The Florida legislature discharged that task by concluding that the unrestricted protection of the private rights of newspapers would not achieve the broad public purpose undergirding the First Amendment.

In areas where great public values intersect, and where a legislature has attempted to deal with a problem by a comprehensive statutory scheme, this Court will accord broad deference to legislative judgments.[145] Thus, the Florida legislature's attempt to resolve the competing mandates and claims of the First Amendment is entitled to be given great weight. The *Herald* dismisses with one sentence the notion that legislatures may act to safeguard public First Amendment interests: "Whether governmental compulsion is by court decree or by statute is constitutionally irrelevant."[146] This Court should not sanction such a limitation on legislative manueverability in so sensitive an area and the Appellant has advanced no sound reason to do so.[147]

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[144] A. 18.

[145] *Heart of Alabama Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Southern Railway Co. v. United States*, 222 U.S. 20 (1911); *Crossman v. Lurman*, 192 U.S. 189 (1904); *Mintz v. Baldwin*, 289 U.S. 346 (1933).

[146] *Herald* Br. at 10. Footnotes omitted. As previously noted, every case cited by the *Herald* in the area of newspaper publication requirements involved a request for a court-declared constitutionally mandated right of access to newspapers, rather than a legislative attempt to resolve competing First Amendment interests or enhance First Amendment values. See *supra* at 24-28.

[147] Allowing legislative manueverability is not only consistent with *CBS v. DNC* and *Red Lion;* it is mandated by them. In those cases, Congress made one determination as to how to reconcile competing First Amendment interests. The Florida legislature had

C. Proper Respect for the Role of the States In The Federal System Dictates Judicial Restraint in Review of State Statutes Reconciling First Amendment Values

In the instant proceeding, the fundamental precept that a court will give great deference to legislative judgments harmonizes with another great constitutional principle: the importance of Federalism.[148] Federal rights must be vindicated in a way that has a minimal impact on the legitimate activities of the states.[149]

In the instant case, Florida made a legitimate legislative effort to vindicate the First Amendment fundamental purpose of assuring an informed electorate. This does not, of course, preclude review by this Court. The Court can and must review state legislative acts to assure that important constitutional principles are not ignored.[150] Where, as in *Mills v. Alabama*, *supra*, a legislature cannot show that it is reasonably attempting to reconcile competing First Amendment values, this Court can properly invalidate a statute regulating newspapers.

By contrast, a candidate reply statute does not bar newspaper editors from speaking on electoral issues or from endorsing candidates at any time. A reply statute could be designed to deal narrowly with the problem the legislature sought to address in *Mills*.[151] For example, such a statute might merely provide that no editorial charges could be made within 24 hours of an election without notifying the candidate and providing opportunity for reply. While the Florida Reply

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made another. That different media are involved is irrelevant. What is important is that the legislature has rendered a judgment as to how to resolve the competing interests, and it is entitled to great weight.

[148] *Younger v. Harris*, *supra*, 401 U.S. at 44.

[149] *Id.*; *Branzburg v. Hayes*, *supra*, 408 U.S. 665 at 706; *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60 (1973); *Miller v. California*, 413 U.S. 15, 30 (1973).

[150] See 28 U.S.C. §1257.

[151] See *supra*, note 68.

Statute is not framed in precisely these terms, its purpose is also to prevent political charges from being made without affording the public an opportunity to hear contrasting views. But under the sweeping rationale advocated by the *Herald*, no state reply statute to remedy the *Mills* or similar electoral problems, no matter how narrowly drawn and well adapted to the First Amendment purpose of preserving the public's interest in electoral information, could withstand a First Amendment challenge.

This Court, which has been continually sensitive to the strength of federal principles, must be particularly wary of adopting an absolute prohibition on state efforts to implement sensitive and conflicting First Amendment values. Federalism is not only a matter of "comity" to states.[152] It also reflects a commitment to the notion that diverse approaches to problems are likely to produce better solutions, just as the First Amendment assumes that there is a greater likelihood that truth will emerge out of a multitude of tongues. Precipitous action by this Court now to prevent experimentation by state legislatures is totally unwarranted.

D. The Court Should Exercise Great Restraint In Light Of The Important Constitutional Principles Converging In This Case

The statute under challenge presents this Court with the convergence of three great interests: the deference to be accorded (a) *a legislative act*, (b) *when adopted by a state*, (c) that attempts to reconcile competing considerations in assuring *the free flow of information to the public*. Whether taken individually or considered

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[152] *Younger v. Harris, supra*, 401 U.S. at 44.

together, the presence of these three interests in this case mandate that any action which this Court takes should be extremely limited.

This ruling will have a critical impact on the ability of both the states and the federal government to assure that their electorates are informed. Thus, any action by this Court must leave legislatures with wide discretion to attempt to resolve and balance the competing interests inherent in the regulation of 50 different state electoral schemes as well as the national electoral process.

There is no line of cases directly presenting the Court with all three of these factors in the same context. But in one line of cases that raised closely related issues, this Court has wisely chosen to leave expansive discretion to legislatures to fill in the interstices of the constitutional framework.

In the legislative apportionment cases, the interests both of federalism and deference to legislative judgment were involved and closely intertwined. And, although no speech issues were directly involved in the apportionment cases, the states' authority to preserve the integrity of their electoral processes—an issue closely related to the speech issue here—was also involved. The evolution of this Court's involvement in the apportionment issue illustrates the manner in which this Court has proceeded where so many sensitive constitutional issues are involved.

Initially, this Court declined even to adjudicate the issue of state legislative apportionment.[153] Then in *Baker v. Carr*,[154] the Court held that the issue was justiciable. But even as it cleared away the barrier to justiciability, it went no further than to declare its adherence to the

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[153] *Colegrove v. Green*, 328 U.S. 549 (1946).

[154] 369 U.S. 186 (1962).

broad constitutional principle of equal protection. When in subsequent cases it clarified the meaning of equal protection in this context by declaring that state legislative districts must reflect population,[155] it left state legislatures broad discretion to consider a variety of criteria in diverse ways in making "an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable."[156] Although various tests evolved for ascertaining whether this standard was met,[157] in applying these tests the courts gave deference to the state's interest in preserving the integrity of political subdivisions,[158] in assuring at least some representation for political subdivisions,[159] in using fractional or multi-member apportionment schemes,[160] and even in deviating substantially from proportional representation[161] so long as the basic equal protection guarantee of proportional representation was not "submerged."[162]

Amicus submits that here, because similarly critical issues of deference, federalism, and substantive rights are involved, similar care and caution is warranted. While the Constitution sets the basic limiting framework of values that must be considered in framing statutes applicable to

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[155] *Reynolds v. Sims*, 377 U.S. 533 (1964).

[156] *Id.* at 577.

[157] Note, "Reapportionment," 79 *Harv. L. Rev.* 1228, 1250 (1966).

[158] See *Abate v. Mundt*, 403 U.S. 182 (1971).

[159] See *Schaefer v. Thomson*, 240 F. Supp. 247 (D. Wyo. 1964).

[160] *Whitcomb v. Chavis*, 403 U.S. 124 (1971).

[161] *Abate v. Mundt, supra.*

[162] *Reynolds v. Sims, supra*, 377 U.S. at 581.

the media, just as in the case of apportionment, there must similarly be a wide area of legislative manueverability for the states[163] and Congress to reconcile the electorate's right to be informed on public issues with the power of the press to exclude such information. Amicus submits that this constellation of principles compels affirmance of the Reply Statute, or at the least a decision that leaves maximum room for legislative flexibility.

Adoption of the broad holding urged by the *Herald* and its *amici* would, for example, prohibit a state from determining that the public's interest in information on electoral matters required that, as part of a statewide voter registration effort, sending voting registrars to counter underregistration,[164] would be effective only if notice of their presence were carried in local newspapers of general circulation.

Similarly, a state might determine that newspapers must sell space to those who wish to reproduce ballot propositions in notice form, as is presently undertaken in many states by the League of Women Voters.

Finally, outside the electoral area, a state legislature might determine that, in order to provide information

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[163] Conditions from state to state vary widely. States might, for example, want to consider such factors as the extent to which major metropolitan areas have competing local newspapers (such as in New York), whether newspapers from major cities inside the state (such as in Iowa) or from outside the state (such as in New Jersey) compete with local newspapers, the extent to which local newspapers or newspapers competing with them accept paid political advertisements and the nature of the state's respective electoral process, e.g. whether there are primary elections for local and/or statewide offices.

[164] *Cf.* the Federal Voting Rights Act of 1965, upheld in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

about matters of urgent public health and safety, notices concerning drugs or other products found to be imminently dangerous should be widely disseminated. The legislature might determine that a statute requiring newspapers in the area the drug or other product was being sold to publish such notices was a valid method of advancing this legitimate governmental purpose.

In all of the above cases, a detailed examination of the context of the legislation, its goals and purposes, and the manner of the legislature's resolution of the competing interests, would be called for. If the statute provided for payment for the particular notice, there could be no question of financial burden, or "tax" or "taking." In addition, all of the above examples are content-neutral–that is, they do not depend on whether or not the newspaper itself says anything on the subject of the material to be printed. Thus, there cannot be any even speculative chilling effect on the media's own discussion of issues from such statutes.

These and other types of specific questions are worth scrutiny each time such a statute is examined within the overall constitutional framework. But because such statutes deal with attempts to maximize First Amendment values, as well as other governmental interests such as the integrity of the electoral process and public health and safety, they should not be held *per se* invalid. As the Court recently stated in dealing with difficult constitutional questions involving state election statutes, there is no "litmus paper test" in such areas, and "hard judgments" must be made in each case.[165]

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[165] *Storer v. Brown*, No. 72-812 (March 26, 1974) Slip Op. at 5.

CONCLUSION

For the foregoing reasons, *amicus* respectfully submits that the decision of the Florida Supreme Court should be affirmed.

Respectfully submitted,

ALBERT H. KRAMER
1346 Connecticut Ave., N.W.
Washington, D.C. 20036

THOMAS R. ASHER
Media Access Project
1910 N Street, N.W.
Washington, D.C. 20036

FRANK W. LLOYD III
Citizens Communications Center
1914 Sunderland Place, N.W.
Washington, D.C. 20036

Attorneys for Amicus Curiae, National Citizens Committee for Broadcasting

Of Counsel:

MATTHEW B. BOGIN
MARIA E. MALDONADO
Student Interns
Media Access Project

SHELLEY HIGGINS
Student Intern
Citizens Communications Center

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